

ARKANSAS COURT OF APPEAL
NOT DESIGNATED FOR PUBLICATION
SARAH J. HEFFLEY, JUDGE

DIVISION IV

CA 07-863

March 19, 2008

JUNIS WAYNE BLAKE

APPELLANT

APPEAL FROM THE ARKANSAS
WORKERS' COMPENSATION
COMMISSION
[NO. F402183]

V.

URRUTIA, INC. AND COMMERCE &
INDUSTRY INSURANCE COMPANY
APPELLEES

AFFIRMED

Junis Wayne Blake appeals from a decision of the Arkansas Workers' Compensation Commission finding that he was not entitled to temporary total disability benefits beyond May 14, 2004, and that further medical treatment of his compensable injury was not reasonable and necessary. Appellant contends that neither finding made by the Commission is supported by substantial evidence. We disagree and affirm.

Appellant, age fifty-nine, was employed as a sanitation worker by Urrutia, Inc. On January 26, 2004, appellant injured his back while he and another employee were lifting a 200-pound entertainment center that had been discarded at the Jacksonville Air Force Base. Appellee accepted the claim as compensable and paid temporary total benefits until May 14, 2004, when a physician concluded that appellant had reached maximum medical improvement. Appellee also paid for medical

treatment provided by various physicians, including a first visit by Dr. Thomas M. Hart. Appellee refused payment of any further treatment, including a discogram recommended by Dr. Hart.

Appellant then filed a claim for additional benefits, asserting that he remained temporarily and totally disabled beyond May 14, 2004, to a date yet to be determined and that he was entitled to further treatment from Dr. Hart. An administrative law judge found that appellant did not qualify for additional temporary total benefits but that further medical treatment was reasonable and necessary. The Commission affirmed the law judge's decision with respect to the denial of additional temporary total benefits, but reversed the finding that further treatment was reasonable and necessary. This appeal followed.

The Evidence

On the day of the injury, appellant was taken to the Cabot Medical Center where he received treatment from Dr. Jason Merrick. Dr. Merrick prescribed pain medication and muscle relaxers for low back strain and sent appellant to physical therapy. An MRI was taken on February 4, 2004, which showed evidence of diffuse disc bulging at L4-5 and L5-S1. There was no evidence of significant canal stenosis, but moderate foraminal narrowing of the L4 and L5 nerve roots was noted. Appellant saw Dr. Merrick one more time before he was sent to Dr. Wayne L. Bruffett on February 26, 2004.

Based on the MRI, Dr. Bruffett believed that the disc bulge with narrowing of the foramen could be irritating the L4 nerve root, particularly since appellant was complaining of pain radiating down his left leg. Dr. Bruffett recommended a nerve-root block at L4, and he also released appellant to sedentary work with a weight-lifting restriction of twenty pounds and no repeated bending, twisting or stooping. As planned, appellant underwent a L4-5 transforaminal epidural injection on March 5, 2004, performed by Dr. William Ackerman.

Appellant returned to Dr. Bruffett on March 15, 2004, and reported that the nerve-root block

helped for a few hours but that his pain had since worsened. Dr. Bruffett noted that appellant's present complaints of pain in the back, hips, groin and legs were non-specific and did not indicate a radicular pattern of nerve-root impingement. He opined that there was nothing in the MRI scan that would suggest appellant was in need of spinal surgery, and he referred appellant to Dr. Bruce Safman, a rehabilitation specialist.

Appellant was seen by Dr. Safman on March 17, 2004. Taking note of the foraminal disc bulge at L4-5, Dr. Safman applied a trigger-point injection. He kept appellant off work and prescribed more pain medication and Lidoderm patches. Appellant had a follow-up visit with Dr. Safman on March 31, 2004. Appellant reported that his back pain had not eased and that the trigger-point injection had helped for only a couple of weeks. In an office note of that date, Dr. Safman stated that appellant's complaints of pain exceeded the objective findings. He repeated the trigger-point injection and gave appellant Lexapro samples to see if there were other factors playing a role in appellant's perception of pain. He released appellant to return to work with a ten-pound weight restriction.

At a visit with Dr. Safman on April 14, 2004, appellant said that he was hurting from the waist down and that he was experiencing parathesis and tremors in both lower extremities. Appellant advised that pain medication was helpful but that the trigger-point injection provided only temporary relief. Dr. Safman noted that appellant was anxious, and he suspected that there could be an emotional component to appellant's problem. On April 28, appellant stated that he was still having lower lumbar and hip pain that extended to his extremities. Dr. Safman gave appellant samples of Effexor and partially refilled appellant's prescription for Ultracet, noting appellant's statement that he could not function without it.

On May 12, 2004, a nerve-conduction study was performed by Dr. Darin K. Wilbourn.

Although appellant relayed his symptoms of low-back pain that radiated down both legs to his feet, Dr. Wilbourn's interpretation was that of a normal study with no evidence of peripheral nerve entrapment, neuropathy, plexopathy, or radiculopathy of the bilateral lower extremities.

Appellant was then sent to Dr. Scott W.F. Carle for an independent medical evaluation on May 13, 2004. Dr. Carle's diagnostic impressions were "idiopathic degenerative disc disease; chronic back and leg pain and weakness of the upper and lower extremities - etiology unknown and likely non-organic; and altered capacity to function in the work place, most likely attributable to non-physiological factors." He concluded that appellant's subjective complaints of injury were not supported by the objective medical evidence and that appellant had reached maximum medical improvement with no permanent impairment. Dr. Carle commented:

It does not appear that this client's inability to work can be rated to a specific measurable impairment to the spine. The findings of disc dessication and bulging disc are found in many individuals and these findings are considered non-specific. He has a normal neurological examination. His ability to tolerate discomfort appears to be significantly impacted by non-physiological processes. His current work ability is likely to be impacted by his motivation to perform work and would not be indicative of his biomedical capacity. His risk for specific injury is not apparent. . . . It does not appear that his current altered capacity to work is apportioned to a specific measurable injury that occurred in January 2004.

Dr. Carle recommended psychosocial screening, stating that it was likely to yield significant personal or social factors as being the major cause for his current need for treatment.

On June 8, 2004, appellant received a psychological evaluation from Dr. Judy White Johnson, a clinical psychologist. Dr. White's assessment was that there were psychological factors associated with appellant's continuing complaints of pain and discomfort. She wrote in her report:

Mr. Blake views himself as being physically ill and endorses an excessive number of hypochondriacal and histrionic somatic complaints including headache, chest pain, back pain, numbness,

tremors, eating difficulties, weakness, fatigue, dizziness and sleep disturbance. His physical problems are increased in times of stress and there is typically clear secondary gain associated with symptoms.

Appellant began treatment with Dr. Thomas M. Hart on June 10, 2005, after receiving approval for a change of physician. In a medical note from that first visit, Dr. Hart was highly critical of the care appellant had received from the previous physicians. He suspected that appellant's pain was either discogenic in nature or associated with a facet joint. He recommended another MRI to be followed by a discogram and post scan CT, if the MRI revealed a disc protrusion or annular disc disruption.

Appellant had another MRI on June 17, 2005. The radiologist's impression from that study was of a "mild disc dessication noted at L3-4 and L4-5, with very mild diffuse disc bulges. These minimally to mildly flatten the ventral aspect of the thecal sac but produce no significant canal or foraminal stenosis." In a letter of July 1, 2006, Dr. Hart continued to recommend discography to document whether appellant did or did not have discogenic pain.

Appellant was sent to Dr. Steven L. Cathey for another independent medical evaluation that took place on February 9, 2006. On physical examination, Dr. Cathey stated that appellant's neurological examination was negative and that he had no sign of lumbar radiculopathy. Straight leg raising was also negative bilaterally. Dr. Cathy noted point tenderness in the lower back, but he detected no paraspinous muscle spasm or restriction of movement. He noted that appellant identified pain in his lower back with rotation of his shoulders and compression of the head, but Dr. Cathey stated that these maneuvers are typically not painful in even acute situations and categorized them as "non physiologic signs."

Dr. Cathey reviewed the electrodiagnostic testing that was performed in May 2004. He noted that the study was negative and revealed no signs of lumbar radiculopathy or peripheral

nerve entrapment, which he said was consistent with the neurological examination he had performed that day. Dr. Cathey also reviewed the MRI studies and concluded that there had been no changes between the studies. Although he stated that the studies revealed mild degenerative disc disease at L3-4 and L4-5, he reported that neither study showed any acute abnormalities that could be related to appellant's compensable injury. He found no evidence of disc herniation, spinal stenosis, or compression fracture.

Dr. Cathey's impression was chronic low back pain secondary to degenerative lumbar disc disease, and he found no evidence to suggest that any structural changes in appellant's low back were related to the January 2004 injury that occurred at work. He also saw no need for discography. Dr. Cathey stated that he suspected that a discogram would yield an abnormal result in the areas where there was degenerative disc disease, but he stated that this finding would not indicate a need for surgical intervention.

Dr. Cathey also stated that appellant would not be entitled to an impairment rating under the AMA Guidelines, and he believed that appellant would have a difficult time obtaining social security disability benefits. He noted that, although activities such as bending, lifting, and stooping might increase appellant's perception of pain in his lower back, there was no medical reason why appellant could not perform those maneuvers.

In a letter dated March 6, 2006, Dr. Hart continued to recommend a discogram. Dr. Hart explained that a disc can be the cause of pain even when there are no signs of neurological deficit and when imaging studies do not show significant nerve compression. He stated that a discogram was an appropriate diagnostic study, as recognized by the North American Spine Society's Protocol Commission, where there is continuing pain four months after an injury with conservative treatment.

Appellant testified at the hearing that he had been unable to work in the two-and-one-half years since the accident. He said that none of the treatment he had received had made him any better and that he was miserable every day. He wanted to be treated by Dr. Hart.

Temporary Total Disability Benefits

Appellant contends that there is no substantial evidence to support the Commission's decision that he has not remained in his healing period. He asserts that only the doctors who performed an independent medical evaluation suggested that he had reached maximum medical improvement but that his treating physicians had not. He also argues that Dr. Hart's recommendation of further diagnostic testing indicates that he remains within his healing period.

A claimant is entitled to temporary total disability benefits for that time period which he continues to heal and is totally incapacitated from earning wages. *K II Construction Co. v. Crabtree*, 78 Ark. App. 222, 79 S.W.3d 414 (2002). The healing period continues until the employee is as far restored as the permanent character of his injury will permit. *Smith-Blair, Inc. v. Jones*, 77 Ark. App. 273, 72 S.W.3d 560 (2002). The persistence of pain is not sufficient in itself to extend the healing period. *Bray v. Int'l Wire Group*, 95 Ark. App. 206, 235 S.W.3d 548 (2006). The question of when the healing period has ended is a factual determination for the Commission to make. *K II Construction Co., supra*.

In determining the sufficiency of the evidence to sustain the findings of the Commission, we review the evidence in the light most favorable to the Commission's findings and affirm if they are supported by substantial evidence. *Stiger v. State Line Tire Service*, 72 Ark. App. 250, 35 S.W.3d 335 (2000). We will not reverse the Commission's decision unless we are convinced that fairminded persons with the same facts before them could not have reached the conclusions arrived at by the Commission. *Id.* In making our review, we recognize that it is the Commission's

function to determine the credibility of the witnesses and the weight to be given their testimony. *Williams v. L & W Janitorial, Inc.*, 85 Ark. App. 1, 145 S.W.3d 383 (2004). When a workers' compensation claim is denied, the substantial evidence standard of review requires us to affirm if its opinion displays a substantial basis for the denial of the relief sought by the worker. *Stiger, supra*.

The Commission found that appellant sustained a lumbar strain in the accident and that this condition had resolved by May 13, 2004, when Dr. Carle stated that appellant had reached maximum medical improvement. In making this finding, the Commission attached great weight to the opinions of Drs. Bruffett, Safman, Carle and Cathey to the exclusion of the opinion offered by Dr. Hart. From our review of the record and in deference to the Commission's credibility determinations, we conclude that the Commission's decision displays a substantial basis for the denial of continuing temporary total disability benefits.

Additional Medical Treatment

Workers' compensation law provides that an employer shall provide the medical services that are reasonably necessary in connection with the injury received by the employee. *Fayetteville School District v. Kunzelman*, 93 Ark. App. 160, 217 S.W.2d 149 (2005). The employee has the burden of proving by a preponderance of the evidence that medical treatment is reasonable and necessary. *Hamilton v. Gregory Trucking*, 90 Ark. App. 248, 205 S.W.3d 181 (2005). What constitutes reasonably necessary treatment is a question of fact for the Commission to determine. *Id.*

Appellant's argument is that, because he has shown in the first point that he remains in his healing period, he is entitled to further medical treatment. As we have found substantial evidence supporting the Commission's finding that appellant has not remained in a healing period, appellant's argument must fail.

Affirmed.

MARSHALL and BAKER, JJ., agree.